IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, et al.,

Appellants,

v.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, et al.,

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v.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND ITS AFFILIATED ORGANIZATIONS

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I.

The Congress of Industrial Organizations and its affiliated organizations file the within Memorandum on behalf of their members because of the tremendous importance of these cases to the future of the labor movement in this country. The decisions of the courts below and the statutes which they validate strike a dangerous blow at a principle which is integral to the very functioning of a trade union in a democratic society. The statutes involved herein are typical of a group of statutes prohibiting any form of agreement between labor organizations and employers through which joining or retaining membership in a union is made a condition of employment.

The group of statutes of which the laws here under review are typical is the second wave of legislation directed at unions and their activities within recent years. The first group of statutes purported to regulate the right to strike and picket

[1] No Memorandum is filed in Case No. 47 only because Appellees have withheld their consent.

as well as the internal affairs of unions. See Dodd, *Some State Legislatures Go to War—On Labor Unions*, 29 Iowa Law Rev. 148 (1944), and Owens, *A Study of Recent Labor Legislation*, 38 Ill. L. Rev. 309 (1944).

Justification for the earlier group of statutes was claimed on the ground that the various state legislatures were merely seeking to prescribe rules for the orderly conduct of labor disputes, or on the ground that they were merely seeking to impose upon unions responsibilities commensurate with the powers imputed to them. Apologists for the enactments pointed out that those laws left intact the unions' right to function and to bargain collectively.

The instant legislation contrasts sharply with the anti-labor legislation which preceded it in three important respects:

1. This legislation injects itself not into the areas of conflict but into an area of agreement. This legislation forbids employer-union agreements with respect to traditional types of union security.

2. This legislation does not seek to lay down rules with respect to the manner in which labor disputes are to be conducted but rather to weaken labor organizations by outlawing all devices which serve to make effective the right of self-organization and assembly.

3. The legislation here under review is distinguished from the earlier body of laws in that it is not regulatory but rather constitutes a flat ban upon all union security agreements.

In considering the scope of the legislation under review it is important to bear in mind that what is subject to the statutes' ban is not merely the closed shop or the union shop. All forms of union security are absolutely prohibited. This would include the preferential shop and maintenance of membership. The latter type of union security, which is characteristic of many contracts between CIO unions and employers, permits employees a certain escape period after the signing of the agreement during which they may withdraw from the union but requires all those who do not withdraw and all who later join the union to retain their membership for the duration of the agreement.

II.

Union security agreements are not novel in our industrial life, as the Economic Brief of Appellants demonstrates. They are coeval with trade unionism itself in this country. Historically, workers have made their right of association in trade unions effective by enforcing rules against working with nonmembers. Working people recognized long ago that unless common rules of employment could be enforced against individual employees the whole meaning and purpose of trade unionism would be set at naught. A labor organization cannot function unless it is empowered to enforce uniform rules upon all those within the bargaining unit. To deprive labor organizations of this power is to create competition between individuals which immediately breaks down the standards which the union has obtained. Employer favoritism to those resorting to individual dealing leads to desertions from the union while employer pressure on individuals to accept employment on less advantageous terms leads union members to fear displacement. In either case, individual bargaining undermines collective action and renders futile the very functioning of the labor organization.

The process of union organization and functioning is an important exercise of the right of freedom of assembly. That right cannot function effectively if labor organizations are denied the power to enter into agreements with employers for some form of union security. In the circumstances of our time union security is integral to the workers' right of free assembly. To say that workers have the right to self-organization and to the protection of trade unions but to deny them the right to render that assembly immune from traditional forms of interference would be to allow the workers' rights to function in a vacuum.

We do not here say, as Appellees contend, that legislatures are affirmatively required to see to it that labor organizations are successful in achieving their purposes. We do say, however, that a legislature may not outlaw union security agreements because the right to function as a union necessarily includes the right to negotiate union security agreements. The fact that the content of this right of freedom of assem-

bly in so far as workers are concerned has no counterpart in connection with the rights of assembly of other groups, such as businessmen, is no answer to our argument. Every civil right functions constitutionally through forms appropriate to its purpose and history. Long ago when arguments similar to those raised in support of the instant legislation were used to attack minimum wage legislation, this Court reminded us that, "Liberty in each of its phases has its history and connotation." *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. To withdraw protection from the right of freedom of assembly in connection with union security agreements is to weaken the right at the very point where protection is most needed and to disfigure the "essential attributes of that liberty." *Near* v. *Minnesota*, 283 U. S. 697.

The basic character of the right to enter into union security agreements renders the instant legislation particularly vulnerable to constitutional attack. This is so because the legislation does not purport to deal with any of the claimed abuses in connection with the securing or administration of union security agreements. For example, the statutes do not seek to provide for "open unions" or to deal with the scope of union security agreements. They constitute a flat ban. But the teaching of this Court in a long series of cases is that legislation invading basic rights can avoid a clash with the Constitution only if it is narrowly drawn to deal with the precise evil which the legislature purports to curb. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *DeJonge* v. *Oregon*, 299 U. S. 353.

III.

All of the claimed justifications for the legislation, such as the "right to work," the "elimination of monopolies," and the "right not to join a union," make it clear that its basic purpose in an attack upon trade unionism. The justifications for the statutes reveal very sharply that it is the hope of the sponsors of the legislation to destroy unions as bargaining entities. This is demonstrated, for example, by the claim of "monopoly" as a basis for this legislation.

What is obviously meant by the claim of "monopoly" is that

unions strive to eliminate wage competition in areas which they organize. By insisting that the instant legislation is "anti-monopoly" legislation Appellees in effect are admitting that it is designed to prevent unions from effectively achieving their purposes and that the anti-closed shop cry is an echo of the historic open shop drive which likewise used a purported opposition to the closed shop to screen its fundamental opposition to all forms of unionism.

This echo too is heard in the claim on the part of the defenders of the legislation that it is designed to preserve the freedom of the individual to work and his "right" not to join a union. The cornerstone of the defense of the instant legislation is that individual freedom which anti-labor employers have traditionally sought to harness to anti-labor purposes.

Those who today defend the right of the individual to work and his right not to join a union are the constitutional descendants of those who vainly sought eleven years ago in the *West Coast Hotel* case to defend the freedom of the individual to contract for sweat-shop wages and more recently, in *Jones & Laughlin v. N.L.R.B.*, 301 U. S. 1, the right of the individual to work without being forced to accept union conditions. The rediscovery of the right of the individual to work or not to join a union is merely a phase of the historic process through which the semantics of freedom is used to promote and preserve inequality of bargaining power between employer and employees. As the LaFollette Committee has pointed out:

> "These 'open shop' statements of the employers' associations were always phrased in a lofty vein. They opposed the closed shop, they said, because it infringed upon the liberty of the workingman to choose his employment regardless of union affiliation. They called upon the public to support them in their effort to free the average workingman from the necessity of joining unions. Sometimes, in fact, they invited unions to lay aside their demands for the closed shop, intimating that their own activities would have no further reason for existence if their invitation were accepted.
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> "That this purported solicitude for the freedom of the workingman from the closed union shop was not in fact the real reason for the existence of these employers' associations, nor indeed the motive for their activities, has

[2] S. Rep. 6, 76 Cong. 1st Sess., Part 1, at 54-55, (1939).

been amply demonstrated in previous reports of this Committee. It has there been shown that under the banner of the 'open shop' the employers' associations created an organized front against collective bargaining and sought to destroy or weaken all union organizations regardless of whether the closed shop was achieved in any given case. Illuminating analyses of the semantics of the closed and open shop and what the terms really meant to the employers' associations which used them may be found in this Committee's report on the Associated Industries of Cleveland, and in the testimony given by employers' association leaders in Los Angeles. Ostensibly the 'open shop' doctrine meant only that there should be no discrimination against non-union workers in hiring, but, in practice, adherence to the open-shop doctrine required that the employer discriminate against union workers in hiring.' Said the American Plan-Open Shop Conference in 1925, 'in the true sense of the American Plan Open Shop he (the employer) cannot maintain 100 percent union crew in any department or in any craft of his business.' Attainment of this objective necessarily required discrimination against union men, and the use of labor espionage or other devices to ascertain the extent of union affiliation in the shop or plant. Collective bargaining encouraged union membership and was therefore implicitly condemned. Some employer groups, in the name of the open shop, even went so far as to forbid the hiring of union men at all. This was the case in Los Angeles at the time of the investigation by the United States Commission on Industrial Relations."

Despite this Court's decisions in *J. I. Case Co.* v. *N.L.R.B.*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Co.*, 321 U. S. 342, and the long line of cases beginning with *Holden* v. *Hardy*, 169 U. S. 366,[4] despite the repeated acknowledgement of those familiar with the realities of industrial life that individual rights theories in labor relations destroy both group and individual freedom, individual rights doctrines are again being used to justify what is basically an assault upon

[4] *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13 (1901), requiring cash redemption of evidence of indebtedness issued in payment of wages; *Patterson* v. *Bark Eudora*, 190 U. S. 169 (1903), forbidding advance payment of seamen's wages; *McLean* v. *Arkansas*, 211 U. S. 539 (1909), prohibiting agreements to pay miners on the basis of the weight of screened coal; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549 (1911), prohibiting contracts limiting liability for injuries to employees; *Bunting* v. *Oregon*, 243 U. S. 426 (1917), limiting hours of work of factory employees; *N. Y. Central R. Co.* v. *White*, 243 U. S. 188 (1917), sustaining workmen's compensation laws; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), sustaining a minimum wage law.

the right of self-organization. Contentions which have long since been discredited have been revived to further a new open shop campaign.

The answer given in 1934 by Professor Robert L. Hale, of Columbia Law School, to the contentions of those who claimed that union security interferes with the right to work is as valid today as it was then:

> "If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally, in the case of a steel plant, he becomes an employee of a steel company, and then has no freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.
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> "Now of course, any system of organization is liable to have faults at times. . . . Government of any sort has certain evils, or may have at particular times, but the only alternative is anarchy, where the evils would be much greater. If he is subject to be governed by the rules of his union he presumably has a little more control over what those rules are than if he is governed solely by the rules laid down by his employer."[1]

Heavily relied upon for support of the legislation are statutes outlawing "yellow-dog" contracts or preventing discrimination against employees because of membership in labor organizations. Invoking a deceptive even-handedness the sponsors of the instant legislation insist that if legislatures may outlaw agreements between employer and employee in which the employee undertakes not to join a union they may likewise outlaw agreements between unions and employers requiring employees to join unions. But the justification for "yellow-dog" and related legislation does not support the instant legislation. On the contrary, that legislation is grounded in precisely the same considerations which prevent interferences with union security agreements:

1. That legislation acquires its validity from the basic prin-

[1] Hearings before Senate Committee on Education and Labor on S 2926, 73d Cong. 2d Sess., at 514 (1934).

ciple that individual employees lack true freedom in dealing with their employers because of a lack of equal bargaining power. By outlawing union security agreements, the instant legislation will promote inequality of bargaining power.

2. That legislation is designed to promote equality of bargaining position and to neutralize employer abuses of economic power in labor relations. The instant legislation deals with arrangements mutually agreed upon between employers and bona fide labor organizations freely chosen as representatives of the employees. This legislation will revive and invite employer abuse of economic power in labor relations by eliminating union security agreements, the historic bulwark against such abuse.

3. That legislation is part of an historic body of federal and state laws which have as their objective the protection of the right of freedom of assembly and self-organization. The legislation under review seeks to destroy the effectiveness of freedom of assembly and self-organization.

* * *

This legislation does not originate in highly industrialized states with extensive experience in the operation of union security agreements. On the contrary it originates in states primarily rural in character. Its purpose is not to correct or to eliminate demonstrated abuses flowing from the entering into or enforcement of union security agreements. Its purpose is the weakening and indeed the destruction of labor organizations. It is a part of the historic open shop drive which seeks to discard and outlaw fundamental and time-sanctioned adjustments which characterize mature labor relations and substitute in their stead the law of the jungle.

We are convinced that this Court will not permit the carefully evolved and deliberately reached solutions of basic labor problems which are reflected in union security agreements to become the victims of this new open shop crusade.

Respectfully submitted,

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